Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JIMMIE L. MARTIN, d/b/a J & L Services; EDDIE M. HAYNES, d/b/a Twilite Recovery Services; MORSE'S AUTO SALVAGE & TOW SERVICE, INC.; LESLIE L. MORSE, SR.; JOHN W. MORSE; ROBERT L. MORSE,

Petitioners,

versus

MARVIN V. STITES, Linn County Sheriff, in his individual and official capacities; MARTIN J. READ; HAROLD J. MOONEY, JR.; CHARLES TRASK, Linn County Board of County Commissioners, in their individual and official capacities; DEAN SCHOENHALS, d/b/a/ Northside Auto,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a political subdivision of a state may avoid preemption under § 14501(c)(1) of the Interstate Commerce Commission Termination Act, precluding "a law, regulation or other provision having the force and effect of law related to a price, route or service" of a motor carrier, by establishing tow policies that do not meet state legislative enactment standards.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Morse's Auto Salvage and Tow Service, Inc., states that it has no corporate parents, and that no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Martin, et al. v. Stites, et al.*, 2001WL 121855 (10th Cir. Feb. 13, 2001), is set forth in the Appendix hereto. Pet. App. 1a-25a. The court of appeals' order denying rehearing and rehearing en banc is also set forth in the Appendix hereto. Pet. App. 31a-32a.

The district court's order granting respondents' motion for partial summary judgment and denying petitioners' motion for preliminary injunction and partial summary judgment in this case is unreported and set forth in the Appendix hereto. Pet. App. 26a-27a. The district court's order denying petitioners' motion to reconsider that court's denial of the same is also set forth in the Appendix hereto. Pet. App. 28a-30a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit affirming the decision of the District Court of the District of Kansas was entered on February 13, 2001. Pet. App. 1a. The order denying petitioner's timely filed petition for rehearing was entered on March 20, 2001. Pet. App. 26a. This petition for writ of certiorari is filed within ninety (90) days from that date.

28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Interstate Commerce Commission Termination Act, 49 U.S.C. Section 14501(c)1:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier *** with respect to the transportation of property.

STATEMENT OF THE CASE

Petitioners are tow truck operators in Linn County, Kansas. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction). The district court held that the established tow policy of the county commissioners and sheriff did not amount to a law, regulation, or other provision having the force and effect of law and for that reason was not preempted. The Tenth Circuit, by Circuit Judges Brorby of the Tenth Circuit and Politz of the Fifth Circuit, who was sitting by designation, affirmed, also holding that county-established towing policies did not amount to a law, a regulation, or have the force and effect of law. Circuit Judge Briscoe of the Tenth Circuit dissented, concluding

that the county-established policy requiring a towing permit is preempted by § 14501(c)(1) because it has the force and effect of law and is related to petitioners' price, route or services.

The court of appeals' holding merits this Court's immediate review because it teaches that state and local governments may regulate towing, in contravention of Congress' intent to deregulate the towing industry, through general state administrative authority that does not meet state legislative enactment standards. In addition, the decision below conflicts with prior declarations of this Court that nearly identical legislative language requires preemption of official, government-imposed policies.

1. Petitioners are tow truck operators in Linn County, Kansas. They sued Sheriff Stites and members of the Linn County Board of Commissioners ("Commissioners") for violation of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501(c)(1).[1] The petitioners challenge two county-established towing policies.

Both policies were announced at public meetings of the Commissioners. The official minutes from the meeting where the first policy was announced report that the county would require a permit to perform non-preference tows. A "non-preference tow" call is one in which the owner or operator of a disabled vehicle has no preference for a particular tow truck operator. In that instance, the sheriff's department, which receives all law enforcement requests for tows in the county, relays a call to a local tow truck

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[1] Mr. Martin, Mr. Haynes and the Morses brought suit in the district court alleging Sheriff Stites and the Commissioners violated anti-trust, civil rights, and federal preemption laws. The summary judgment order appealed here deals only with the preemption claim. Mr. Schoenhals, a private tow operator, is also a defendant in the case, but is not involved in the federal preemption issue in this appeal.

company. The county counselor, clerk and sheriff were directed to create an application form for said permits. Among other things, the permit application requires the applicant to disclose the location of a legal and properly zoned storage area for vehicles and for information related to the applicant's insurance. Both the sheriff and the county commission chairman must approve and sign the permit form. Thus, the completion and approval of the permit form is a prerequisite to receiving non-preference tow calls through the county's dispatcher. Roughly eighty percent of all tow calls in Linn County are non-preference.

The second towing policy, announced at a February 1998 public meeting of the Commissioners, divides the county geographically into eastern and western portions for purposes of assigning non-preference tow truck calls. All of the Commissioners voted in favor of this policy. Under the new policy, petitioners Morse were allotted the western part of the county, while petitioners Martin and Haynes and defendant Shoenhals were assigned the more lucrative eastern part of the county, from which eighty percent of all tow calls originated. Since petitioners Haynes and Martin are no longer providing towing services[2], defendant Schoenhals is assigned all of that eighty percent.

In the course of deciding which tow operators may be issued a permit to tow, the Commissioners and sheriff have refused to grant permits to companies not located in Linn County so long as a Linn County business provides the same service. This refusal is based on the county's desire to refer calls only to local businesses and to protect Linn County taxpayers. As a result of the county's refusal to grant towing permits to companies not located in Linn County, petitioners Morse have been prevented from providing services where a large wrecker is necessary. The

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[2] The sheriff instructed county dispatchers not to call Haynes, even if a consumer specifically requested his services.

county only has allowed defendant Shoenhals to provide such services.

The county commission chairman has testified that when the Commissioners met to enact the foregoing towing policies, said policies were enacted by consensus agreement of the Commissioners pursuant to their home rule powers. He has also testified that the Commissioners developed the towing policies, expected compliance with them and expected the sheriff to enforce the same.

2. The Towing Companies sought declaratory and injunctive relief from the district court. At the evidentiary hearing on the Towing Companies' motion for preliminary injunction, the district court posed to counsel for the Commissioners and sheriff the legal issue central to this appeal: "Well, I understand what you're saying, but I don't think there's any question about whether regulation is preempted or not. The question is, is this regulation?" Respondents' counsel, at that same hearing, did not deny respondents were regulating; rather, he sought to show the district court "what regulations have been in place and why they've been in place." Respondents' counsel also argued that "[c]ertainly having any regulation of a system at all is preferable to not having any system." The district court held that petitioners failed to supply evidence that the towing policies amounted to laws, regulations, or other provisions having the force and effect of law and therefore the policies were not preempted by § 14501(c)(1). Et. App. 26a-27a, 29a.

3. The court of appeals expressly recognized it was required to decide whether the two county-established towing policies are laws, regulations or other provisions having the force and effect of law. Pet. App. 2a. It acknowledged this Court's statements in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n. 5 (1995), interpreting a virtually identical preemption clause to § 14501(c)(1):

> According to the Court, "the word series 'law, *** regulation *** or other provision' *** 'connotes official, government-imposed policies, not the terms of a private contract.'" The phrase "'having the force and effect of law' is most naturally read to 'refer to binding standards of conduct that operate irrespective of any private agreement.'"

Pet. App. 10a-11a. Two circuit judges held that the county established towing policies do not have the force and effect of law because they are not formal, effective legislation, in that they are not part of a resolution that was passed by the county commission and published in the official county newspaper, and because they are not guidelines or standards that bind county officials' conduct. *Id.* at 14a, 16a-17a. Both the majority and dissent upheld the county's geographic division policy. *Id.* at 18a.

Circuit Judge Briscoe, dissenting with respect to the county's established towing permit policy, stated:

> Even though the majority characterizes the permit form as a "mere formality," the fact is that the permit policy imposes binding standards of conduct on towing service operators interested in receiving business from the county (i.e., non-preference calls from the sheriff's dispatchers). If towing service operators do not complete the permit form, they will lose the towing business generated by non-preference calls from the sheriff's dispatcher. Our focus in addressing § 14501(c)(1) should be upon the permit policy's effect upon the conduct of towing service operators, and not its effect upon the

> conduct of the sheriff and county commission chairman. By downplaying the effect of the permit policy upon towing service operators, the majority acts in contravention of the intended purpose of the Interstate Commerce Commission Termination Act (to preempt state regulation of intrastate motor carrier activities) and paves the way for other states or political subdivisions to impose their own unique procedural requirements on towing service operators or other motor carriers.

Id. at 20a. Judge Briscoe concluded that the permit policy runs afoul of § 14501(c)(1). *Id.* at 20a-21a. The panel majority itself conceded that whether the permit policy is preempted presents "a closer question." *Id.* at 15a.

4. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for several reasons. *First*, the decisions below are contrary to the plain language and the intent of § 14501(c)(1). *Second*, the decisions below are contrary to this Court's interpretations of virtually identical statutory provisions as those in question. *Third*, this issue is important and warrants the Court's consideration in that § 14501(c)(1) affects every state and local government, and the court below has laid the groundwork for avoiding preemption and subverting Congress' intent in enacting the same.

I. THE DECISIONS BELOW IGNORE THE PLAIN LANGUAGE AND INTENT OF THE ICCTA'S PROVISIONS DEREGULATING THE MOTOR

CARRIER INDUSTRY.

In 1994, Congress enacted what is now known as the Interstate Commerce Commission Termination Act ("ICCTA") to deregulate the motor carrier industry nationwide. *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001). The ICCTA preemption language relevant to this appeal provides:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier *** with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Courts have concluded that this provision generally preempts local regulation of the prices, routes, or services provided by towing companies. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 771 (2d Cir. 1998), *cert. denied*, 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 543 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Regulation is not limited to only valid legislative enactments directed toward an activity. Its ordinary meaning is: "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1286 (6th ed. 1990); *cf. Stratford School Dist. v. Employers Reinsurance Corp.*, 162 F.3d 718, 722 (1st Cir. 1998) (*citing* Black's Law Dictionary 1286 (6th Ed. 1990)) (rejecting interpretation of "regulation" in New Hampshire statute establishing a pooled risk management program to

mean only promulgated administrative regulations). The county-established towing policies fit squarely within the rubric of regulation or other provision having the force and effect of law.

Any other result would elevate form over substance and allow state and local governments to evade the prohibitions of § 14501(c)(1), or any other federal enactment with a similar preemptive word series, simply by evading compliance with state enactment requirements. It would leave preemption of local regulation of intrastate towing "unduly dependent" on whether state law deems a government entity's action as creating a validly enacted law, "a distinction which is at best a very poor proxy" for comporting with Congress' intent in enacting the ICCTA and "[d]etermining claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government entities concerned, is an enterprise that [this Court] has consistently eschewed." *Cf. Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 679-80 (1996) (citations omitted) (refusing to leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract for employment or a contract for services).

II. THE DECISIONS BELOW ARE CONTRARY TO THIS COURT'S INTERPRETATION AND APPLICATION OF IDENTICAL STATUTORY PROVISIONS.

The central purpose of enacting § 14501(c)(1) was to extend the identical intrastate preemption of prices, routes and services as that originally contained in § 105(a), of the Federal Aviation Authorization Act, 49 U.S.C. App. (1988 Ed.) § 1305(a)(1). H.R. Conf. Rep. No. 103-677, at 82 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754; *see*

also Ace Auto Body, 171 F.3d at 773; *R. Mayer*, 158 F.3d at 545. Congress also intended for the broad preemption interpretation adopted by this Court in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374 (1992), to apply to this statute. H.R. Conf. Rep. No. 677, at 83, *reprinted* in 1994 U.S.C.C.A.N. at 1755.

In *Morales*, the issue was whether states were preempted from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. 504 U.S. at 378-79. The National Association of Attorneys General adopted Air Travel Industry Enforcement Guidelines, containing detailed standards governing the content and format of airline advertising, the awarding of premiums to frequent flyers, and the payment of compensation to "bumped" passengers. *Id.* at 379. The guidelines did "not purport to create any new laws or regulations applying to the airline industry; rather they claim to explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Id.* (quotations omitted). The attorneys general of numerous states threatened to enforce the guidelines against airlines they deemed to be non-compliant, and those airlines sought injunctive relief against the same. *Id.* at 379-80.

The statute at issue in *Morales*, and which Congress intended § 14501(c)(1) to mirror, stated in relevant part: "[N]o State or political subdivision thereof *** shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier ***." 504 U.S. at 378-79; 49 U.S.C. App. (1988 Ed.) § 1305(a)(1); H.R. Conf. Rep. No. 103-677, at 83, *reprinted* in 1994 U.S.C.C.A.N. at 1755. This Court noted these words express a broad preemptive purpose , and then adopted the following standard: "*State enforcement actions having a connection with or reference to* airline 'rates, routes, or

services' are pre-empted ***." 504 U.S. at 383-84 (emphasis added).

The attorneys general argued that only state laws specifically addressed to the airline industry were preempted and that the Federal Statute imposed no constraints on laws of general applicability. *Id.* at 386. The Court responded: "Besides creating an *utterly irrational loophole* (*there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute*), this notion similarly ignores the sweep of the 'relating to' language." *Id.* (emphasis added). It stated that in addition to the fact that every one of the guidelines bears a "reference to" airfares, "collectively, the guidelines *establish binding requirements* as to how tickets may be marketed if they are to be sold at given prices." *Id.* at 388 (emphasis added).

This Court revisited the relevant language of § 14501(c)(1), again in the context of applying § 1305(a)(1) of the Federal Aviation Authorization Act, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In *Wolens*, the Court interpreted the words "enact or enforce any law" in the instruction: "[N]o State *** shall enact or enforce any law *** relating to [air carrier] rates, routes, or services." *Id.* at 226. It stated, "the word series 'law, rule, regulation, standard, or other provision,' *** connotes *official, government-imposed policies* ***." *Id.* at 229 n. 5 (emphasis added). It also declared the phrase "'having the force and effect of law' is most naturally read to 'refe[r] to binding standards of conduct ***." *Id.* It was proclaimed:

> [T]he ban on enacting or enforcing any law "relating to rates, routes, or services" is most sensibly read, in light of the [Statute's] overarching deregulatory purpose, to mean "States may not seek to impose their own

> public policies or theories of competition or regulation on the operations of an air carrier.

Id. That is precisely what the Commissioners and sheriff, through an official, government-imposed policy, have done in this case. They have used their general coercive and administrative powers to specifically regulate towing activities protected by federal law, even to the extent of interference with local competition.

Justice O'Connor's concurring and dissenting opinion in *Wolens* is particularly relevant:

> How can it be that the guidelines, which did not themselves constitute law, were nonetheless pre-empted by a statute whose coverage is limited to "laws" or other "provision[s] having the force and effect of law"? The answer is that in *Morales* we held that *an action to invoke the State's coercive power against an airline*, by means of a generally applicable law, *when the subject matter of the action related to airline rates, would constitute "Stat[e] *** enforce[ment]" of a "law *** relating to rates, routes, or services."*

Id. at 240 (emphasis added). Justice O'Connor also noted that the guidelines at issue in *Morales* had no binding force on their own, but were nonetheless preempted. *Id.*

Based on this Court's pronouncements in *Morales* and *Wolens*, it is clear that § 14501(c)(1) preempts official, government-imposed policies having a connection with or reference to towing companies' prices, routes or services. The issue, therefore, is simply whether the "county established towing policies," as the court of appeals

described them, can be considered official, government-imposed policies. They very clearly are.

The Commissioners intended to regulate towing and believed they were regulating towing. Indeed, they have argued that some regulation is surely preferable to no regulation. But federal preemption doctrine applies regardless of the importance of the issue to local authorities. *Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). When those that develop and administer the governmental scheme admit their intention to regulate, and the facts confirm the same, a conclusion to the contrary plainly frustrates the purposes of the ICCTA.

As support for its decision, the court of appeals reasoned that the county-established towing permit policy required no more from towing operators than was previously required by law. This is the same argument that was rejected in *Morales*, where the attorneys general argued that the guidelines merely explained how to apply existing law. In fact, as Justice O'Connor pointed out, the *Morales* guidelines themselves were not binding but were nonetheless preempted. *Wolens*, 513 U.S. at 240. The Commissioners and sheriff are as bound by the county-established tow policies as were the attorneys general by the preempted guidelines in *Morales*. The court of appeals' rationale demonstrates how similar the county's established policies are to the guidelines that were preempted in *Morales*. It defies the unmistakable intent of the ICCTA to maintain that requirements which would be preempted if contained in an ordinance are not preempted when administered by elected officials deriving their authority from legislative conferrals of power.

The court of appeals' justification is that county-established towing policies do not articulate binding standards of conduct, as the sheriff and Commissioners suffer no official repercussion for violating said policies.

Even Circuit Judge Briscoe recognized that the courts' focus should be on the towing policies' effect upon the conduct of towing service operators, and not their potential effect on the sheriff and Commissioners. Indeed, it raises questions about the majority's emphasis on the county's failure to comply with state statutory requirements for enacting legislation. What repercussion or reprimand would the sheriff and Commissioners have suffered for violating the same towing policies if validly enacted? Moreover, what official repercussion would the attorneys general in *Morales* have suffered for failing to apply the guidelines?

The courts below erroneously concluded that federal preemption under the ICCTA necessarily depends upon meeting state definitions of legislative enactments before such conduct can be scrutinized for interference with a federal preemption scheme. *Cf. Umbehr*, 518 U.S. at 668 (refusing to leave first amendment rights dependent on state law classifications of workers' status). In this instance, the legal determination of whether the county-established tow policies have the force and effect of law should not depend on publication requirements. Such a narrow application of § 14501(c)(1) would result in an "utterly irrational loophole" that would effectively allow state and local governments to circumvent the ICCTA and to enforce regulatory schemes that Congress clearly intended to preempt.

III. THIS ISSUE IS IMPORTANT AND WARRANTS THE COURT'S CONSIDERATION IN THAT THE RELEVANT STATUTE AFFECTS EVERY STATE AND LOCAL GOVERNMENT, AND THE COURT BELOW HAS LAID THE GROUNDWORK FOR AVOIDING PREEMPTION AND SUBVERTING CONGRESS' INTENT IN ENACTING § 14501(c)(1).

Since Congress passed the legislation in 1994 deregulating the motor carrier industry, six circuit courts of appeal have ruled on the application of § 14501(c)(1). *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Martin v. Stites*, Pet. App. 1a-25a; *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000); *Cardinal Towing & Auto. Repair, Inc. v. City of Bedord*, 180 F.3d 686 (5th Cir. 1999); *Ace Auto Body*, 171 F.3d 765; *R. Mayer*, 158 F.3d 538. As Judge Briscoe noted, in her dissenting opinion below, the panel majority's teachings pave the way for any state or local government to impose their own unique procedural requirements, indeed their own theories of acceptable competition, on towing service operators or other motor carriers. Pet. App. 20a. Allowing each political subdivision of a state to impose different restrictions on which companies are permitted to tow, where they are permitted to tow, the type of equipment they are permitted to use, the financing of their equipment, what property they are permitted to tow, the type and amount of insurance they obtain, the type and size of their storage facilities, etc., would result in the very patchwork of conflicting standards that Congress sought to avoid by enacting § 14501(c)(1). Such a rule of law, being so contrary to the plain intent of the ICCTA, should be rejected by this Court, and summarily reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 99-3192

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JIMMIE L. MARTIN, d/b/a J & L Services; EDDIE M. HAYNES, d/b/a Twilite Recovery Services; MORSE'S AUTO SALVAGE & TOW SERVICE, INC.; LESLIE L. MORSE, SR.; JOHN W. MORSE; ROBERT L. MORSE,
Plaintiffs-Appellants,

v.

MARVIN V. STITES, Linn County Sheriff, in his individual and official capacities; MARTIN J. READ; HAROLD J. MOONEY, JR.; CHARLES TRASK, Linn County Board of County Commissioners, in their individual and official capacities; DEAN SCHOENHALS, d/b/a/ Northside Auto,
Defendants-Appellees.

February 13, 2001, Filed

COUNSEL:

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JUDGES:
Before BRORBY, POLITZ, ** and BRISCOE, Circuit Judges. BRISCOE, Circuit Judge, concurring and dissenting.

OPINIONBY:
WADE BRORBY

OPINION:

ORDER AND JUDGMENT *

We must decide on appeal whether county established towing policies are preempted by federal law. The district court denied plaintiffs' motions for preliminary injunction and partial summary judgment on the federal preemption issue and granted defendants' motion for partial summary judgment on the same issue, holding the sheriff's policies are not preempted by § 14501(c) of the Interstate Commerce Commission Termination Act ("ICCTA"). The district court subsequently denied plaintiff's motion for reconsideration. Plaintiffs appeal the district court's rulings on the issue of federal preemption. We affirm.

FACTUAL BACKGROUND

Mr. Martin, Mr. Haynes and the Morses (collectively "Towing Companies") are Linn County, Kansas, tow truck

operators. They sued Sheriff Stites and members of the Linn County Board of Commissioners ("Commissioners") for violation of the Interstate Commerce Commission Termination Act, *49 U.S.C.* § *14501*(c)(1).[1] Section 14501(c)(1) expressly preempts state and municipal laws, regulations or provisions "having the force and effect of law" that regulate the prices, routes or services provided by towing companies. The Towing Companies challenge two county-wide towing policies.

The first policy was announced in December 1997, at a public Board of County Commissioners meeting. The minutes from the meeting report that as a result of an executive session, requested by Sheriff Stites to consult with counsel on a legal matter, the county "set a 60-day moratorium for towing county requested vehicles. After that 60 days, the county will only use tow services that have filed an approved application for county tows and been approved by the county commission." The sheriff, among other people, was tasked with designing an application form.

As implemented by the sheriff, this policy requires each tow operator to fill out an "Application for Permit for Towing Services for Linn County" ("permit form") in order to receive non-preference tow calls from the sheriff's department.[2] The permit form seeks personal and tow truck information, asks whether the operator has current Kansas Corporation Commission authority, requests a copy of the vehicle's inspection report showing compliance with *49 CFR 396.17 - 396.23*, and requires the applicant to disclose the location of the applicant's legal and properly zoned storage area for vehicles. Both the sheriff and the county commission chairman must approve and sign the permit form. Thus, the completion and approval of the permit form is a prerequisite to being put on the list to receive non-

preference tow calls from the sheriff's dispatcher. However, a county-based or out-of-county operator can conduct preference tows in Linn County without completing a permit form.

The second towing policy divides the county geographically into eastern and western portions for purposes of assigning non-preference tow truck calls. In 1995, when Sheriff Stites first became sheriff, the department used a geographical division of Linn County. In 1997, Sheriff Stites changed to a pure rotation system, in which the geographic location of the towing company was irrelevant. In February 1998, however, the policy was again altered to allocate non-preference calls based on a geographic division of the county.

The minutes from the February 1998 public meeting reveal the second policy was announced following an executive session. There are no minutes from the executive session in the record, but the minutes recorded from the regular session disclose that "as a result of the executive session the commission reported that from now on towing services for the county will be split from east and west .... This arrangement will be for the county tows and non preference tows." Under the new policy, the Morses were allotted the western part of the county, while Mr. Martin, Mr. Haynes, and Mr. Shoenhal were assigned the more lucrative eastern part of the county, from which eighty percent of the non-preference tows are generated. The Towing Companies have since complained that in practice most non-preference calls are directed to Mr. Shoenhal's towing business. The Towing Companies sought declaratory and injunctive relief from the district court.

PROCEDURAL HISTORY

In order to establish our jurisdiction to review the merits of the Towing Companies' preemption claim, it is necessary to detail the procedural history of this case. The district court, after holding an evidentiary hearing, denied the Towing Companies' motion for preliminary injunction because the Towing Companies "failed to put forth evidence that Sheriff Stites' towing policy amounted to a law, a regulation, or other provision having the force and effect of law"; and therefore failed to establish the Towing Companies' substantial likelihood of success on the merits.[3]

Subsequently, the district court ruled on the parties' cross-motions for partial summary judgment on the federal preemption issue. The district court granted the Commissioner's motion for partial summary judgment, and denied the Towing Companies' motion. In a terse order, the district court held the summary judgment papers revealed no genuine issue of material fact, and "as a matter of law, Sheriff Stites' towing policy does not amount to a law, a regulation, or other provision having the force and effect of law." While the district court did not explain its reasoning, the court apparently consolidated the two towing policies into one, and found the "towing policy," as a whole, was not preempted because there was no evidence the commission invoked its home rule authority when adopting the policy pursuant to Kansas law, K.S.A. § 19-101a.

The district court granted the parties' joint motion to certify the court's partial summary judgment rulings as a final order, pursuant to Rule 54(b). An order *nunc pro tunc* expressly limited the scope of the final order to the preemption claim.

The Towing Companies timely filed a "motion to reconsider" their application for preliminary injunction, motion for partial summary judgment, and the granting of defendant's motion for partial summary judgment. The

district court construed the Towing Companies' motion for reconsideration as a Rule 59(e) motion to alter or amend the judgment, and denied the motion because the court found "the Linn County towing policy does not amount to a law, regulation, or other provision having the force and effect of law; therefore, it is not preempted by *49 U.S.C. § 14501*."

The Towing Companies filed an interlocutory appeal to this court, and the district court stayed all other proceedings in the case. In the Towing Companies' notice of appeal, they challenge the district court's orders: 1) refusing plaintiff's motions for preliminary injunction; 2) denying plaintiff's motion for partial summary judgment; 3) granting defendants' motion for partial summary judgment; and 4) denying plaintiff's motion to reconsider.

The Towing Companies assert the towing policy is a joint policy of the commissioners and sheriff having the force and effect of law. The Towing Companies contend the policy schemes are a joint effort because the Commissioners and sheriff together promulgated the policies, the Commissioners then enacted the policies, and the sheriff enforced them. The essence of the Towing Companies' argument is that the permit and the geographic division policies, which were coordinated efforts by the Board and the sheriff, each are a law, a regulation, or have the force and effect of law and, thus, are preempted by federal law. n4 At the outset, we should clarify that we view the geographic division and permit policies as two distinct policies that act together, and we will review them as such.

JURISDICTION

We unquestionably have jurisdiction to review the district court's denial of plaintiff's preliminary injunction pursuant to *28 U.S.C. § 1292(a)(1)*, which states, in

relevant part, "the courts of appeals shall have jurisdiction of appeals from ... interlocutory orders of the district courts ... refusing ... injunctions." When a district court's interlocutory order expressly denies an injunction, the order "fits squarely within the plain language of *28 U.S.C. § 1292 (a)(1)*" and is immediately appealable. *Utah State Dep't of Health v. Kennecott Corp., 14 F.3d 1489, 1496* (10th Cir.), *cert. denied, 513 U.S. 872 (1994)*.

We have jurisdiction to review the district court's final order granting partial summary judgment to defendants under *28 U.S.C. § 1291* and Rule 54(b). The *denial* of a motion for summary judgment is generally not a final, appealable decision under *28 U.S.C. § 1291. Lee v. Nicholl, 197 F.3d 1291, 1297 (10th Cir. 1999); but see Rose v. Uniroyal Goodrich Tire Co., 219 F.3d 1216, 1221 n.3 (10th Cir. 2000)*. As is the case here, however, the denial of partial summary judgment becomes appealable under *28 U.S.C. § 1291* when it is accompanied by a final order granting a cross-motion for partial summary judgment. *See Stroehmann Bakeries, Inc. v. Local 776, Int'l Brotherhood of Teamsters, 969 F.2d 1436, 1440* (3d Cir.), *cert. denied, 506 U.S. 1022, 121 L. Ed. 2d 585, 113 S. Ct. 660 (1992); see also Abend v. MCA, Inc., 863 F.2d 1465, 1482 (9th Cir. 1988)*. In this instance, the district court certified as a final order the granting of the Commissioner's cross-motion for partial summary judgment, thus giving us jurisdiction. Because we have jurisdiction to review the district court's denial of the Towing Companies' motions for preliminary injunction and partial summary judgment, and the grant of the Commissioner's partial summary judgment, we have jurisdiction to review the district court's motion for reconsideration. Having established our jurisdiction, we proceed to the merits of the case.

STANDARD OF REVIEW

"The standard of review for a denial of a motion for reconsideration depends on the nature of the underlying decision." *Johnson v. Thompson, 971 F.2d 1487, 1498* (10th Cir.), *cert. denied, 507 U.S. 910, 122 L. Ed. 2d 654, 113 S. Ct. 1255 (1993).* In this case, the motion for reconsideration was based on the district court's preliminary injunction and partial summary judgment rulings. Although we review the district court's denial of a preliminary injunction for an abuse of discretion, the underlying preemption determination is reviewed *de novo. St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of the United States Virgin Islands, 218 F.3d 232, 235 (3d Cir. 2000); see also Hawkins v. City & County of Denver, 170 F.3d 1281, 1292* (10th Cir.), *cert. denied, 528 U.S. 871, 145 L. Ed. 2d 145, 120 S. Ct. 172 (1999).* "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Hawkins, 170 F.3d at 1292* (quotation marks and citation omitted).

We review the district court's grant of summary judgment de novo, applying the same legal standards used by that court. *Charter Canyon Treatment Ctr. v. Pool Co., 153 F.3d 1132, 1135 (10th Cir. 1998).* Summary judgment should not be granted unless the evidence, viewed in the light most favorable to the party opposing the motion, shows there are no genuine issues of material fact and the moving party is due judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). "Where, as here, the parties file cross motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." n5 *James Barlow Family Ltd. Partnership v. David M. Munson, Inc., 132 F.3d 1316, 1319 (10th Cir. 1997), cert. denied, 523 U.S. 1048, 140 L. Ed. 2d 513, 118 S. Ct. 1364*

(1998). The Towing Companies admit no material issues of fact are in dispute; our review is limited to whether the towing policies, as a matter of law, constitute a law, regulation, or have the force and effect of law.

DISCUSSION

Preemption Principles

The Supremacy Clause of the United States Constitution provides that the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. In any preemption analysis, congressional intent is the "'ultimate touchstone.'" *Tocher v. City of Santa Ana, 219 F.3d 1040, 1045 (9th Cir. 2000)* (quoting *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)), petition for cert. filed*, (U.S. Nov. 29, 2000) (No. 00-916). Federal law preempts state law in three circumstances: (1) Congress explicitly defines the extent to which the enacted statute preempts state law; (2) state law actually conflicts with federal law; or (3) state law attempts to regulate "conduct in a field that Congress intended the Federal Government to occupy exclusively." *Choate v. Champion Home Builders Co., 222 F.3d 788, 792 (10th Cir. 2000)* (citing *English v. General Elec. Co., 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990)).* "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone, 505 U.S. at 517.*

Interstate Commerce Commission Termination Act § 14501(c)

In 1994, Congress enacted the Federal Aviation Administration Authorization Act ("Aviation Act"), as

amended by the Interstate Commerce Commission Termination Act § 14501(c), in order to deregulate the motor carrier industry nationwide. *Tocher, 219 F.3d at 1046.* Congress intended the ICCTA, like the Aviation Act, to broadly preempt state and local regulation, with an exemption for the state's authority to regulate motor vehicle safety. *49 U.S.C. § 14501(c)(2)(a); see R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 541 (11th Cir. 1998), cert. denied, 526 U.S. 1038, 143 L. Ed. 2d 498, 119 S. Ct. 1334 (1999).* The ICCTA express preemption language relevant to this appeal provides:

> General Rule.- Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a *law, regulation or other provision having the force and effect of law* related to a price, route, or service of any motor carrier ... with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added). It is apparent from the plain language of the statute the threshold issue before this court is whether the two towing policies are "laws, regulations or other provisions having the force and effect of law."

The Supreme Court has shed some light, in dicta, on similar preemption language. According to the Court, "the word series 'law, ... regulation ... or other provision' ... 'connotes official, government-imposed policies, not the terms of a private contract.'" The phrase "'having the force and effect of law' is most naturally read to 'refer to binding standards of conduct that operate irrespective of any private agreement.'" *American Airlines, Inc. v. Wolens, 513 U.S.*

219, 229 n. 5, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995) (interpreting the preemption clause of the Airline Deregulation Act of 1978 which contains similar preemption language to the ICCTA). "This court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Gaylor v. United States, 74 F.3d 214, 217* (10th Cir.), *cert. denied, 517 U.S. 1211, 134 L. Ed. 2d 934, 116 S. Ct. 1830 (1996)*. We find the Court's dicta construing the preemption clause in the Airline Deregulation Act instructive in determining whether the geographic division or the permit towing policies rise to the level of "law, regulation, or having the force and effect of law."

Geographic Division Policy

After reviewing the record, we hold the Towing Companies failed to show, as a matter of law, that the geographic division policy is a law, regulation, or has the force and effect of law.

The Towing Companies submitted the minutes from the Board's February 1998, regular session as evidence of the Board's participation and acquiescence in adoption of the geographic division policy. The details were sparse, but the minutes mentioned that Sheriff Stites and the Board members met in a brief executive session, and "as a result of the executive session the commission reported that from now on towing services for the county will be split from east and west." The fact the commissioners announced the adoption of the geographic division policy after an executive session does not *de facto* establish the policy as a law or regulation or imbue the policy with the force and effect of law. In fact, it suggests the opposite conclusion because, as

Chairman Read acknowledged in his deposition, the Board members are "prohibited by law from taking any action in an executive session." The Towing Companies have failed to produce evidence showing the Commissioners took any action beyond publicly announcing Sheriff Stites' policy.

Even if we assume, without deciding, the geographic policy is attributable to the Commissioners and not the sheriff, the Towing Companies still failed to show the geographic division policy rises to the requisite level of formal legislation required by K.S.A. § 19-101a. The Towing Companies suggest the Commissioners used home rule authority because Mr. Read, the Linn County Commissioner Chairman, suggested the geographic division policy was enacted by the Commissioners in a "consensus agreement" pursuant to their home rule powers. Chairman Read's testimony, however, is inconsistent because he also attributes the geographic division policy to the sheriff, rather than the Commissioners. In this case, the Chairman's statement the home rule powers were used is not dispositive because we are entitled, if not obligated, to review the Commission's actual compliance with K.S.A. § 19-101a.

Kansas law articulates precise statutory requirements for counties to pass effective legislation under the counties' home rule authority:

(a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions:

....

(b) Counties shall apply the powers of local legislation granted in subsection (a) by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection

(a) ..., such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper.

K.S.A. § 19-101a(a-b). The Towing Companies have put forth no evidence showing the Commissioners passed a resolution and published in the official county newspaper, as mandated in K.S.A. § 19-101a.

The Towing Companies assert that the Commissioner's abidance with the K.S.A. § 19-101a statutory requirements is not necessary because the Commissioners can enact a law or regulation under K.S.A. § 19-212. Specifically, K.S.A. § 19-212 states: "The board of county commissioners of each county shall have the power, at any meeting: ... Sixth. To represent the county and have the care of the county property, and management of the business and concerns of the county, in all cases where no other provision is made by law." This provision, unlike K.S.A. § 19-101a, has no express resolution or publication requirement. The Towing Companies' argument is not persuasive.

By the plain language of the statute, K.S.A. § 19-212 is appropriately invoked by the Board of County Commissioners when managing county property and internal business. Our decision that K.S.A. § 19-212 is not applicable in this instance is supported by the Kansas Attorney General's opinion. *See Kan. Att'y Gen. Op. No. 81-146, 1981 WL 15647* at *1 (Kan. A.G. 1981) (suggesting publication is not required when a county adopts a personnel manual for county employees). According to the Attorney General, K.S.A. § 19-212 is a "delegation[] of authority to administer [not legislate] county business; to handle its day to day affairs." *Id.* at *2. In contrast, K.S.A § 19-101a accords legislative and administrative powers, "and may be

looked to primarily when exercising the general police powers of the county." *Id.* It is common sense that if a policy is to be considered an official "law" or "regulation" it must be a matter of local legislation passed pursuant to K.S.A § 19-101a, rather than a mere day-to-day administrative matter that relates to county property and business. For this reason, we hold K.S.A. § 19-212 is inapplicable, the Towing Companies made no showing the Commissioners invoked their home rule authority pursuant to K.S.A § 19-101a, and, therefore, the geographic division policy is not a law or regulation.

The Towing Companies further failed to show the geographic division policy has the "force and effect of law." There is no evidence in the record to suggest the geographic division policy has a guideline or "standard" that binds the sheriff's conduct. *See United Airlines, 513 U.S. at 229 n.5.* For instance, the sheriff suffers no official repercussion or reprimand for violating the geographic division policy, and, in fact, there is no evidence to suggest the sheriff can not unilaterally change the policy, as he had done once in the past. The Towing Companies' contention the "county officials have acted as if the tow policy is valid" is simply insufficient to demonstrate formal regulation and control over the parties' conduct. In sum, the tow operators could still tow in the county regardless of the geographic division of the county, and nothing would happen either to the operator or to the sheriff if either party violated the policy. Thus, it is our conclusion the geographic division policy does not amount to a law, a regulation, or have the force and effect of law; accordingly, the geographic division policy is not preempted. For this reason, we affirm the district court's grant of partial summary judgment for Commissioners and affirm the district court's denial of partial summary judgment for the Towing Companies on the geographic division policy.

Permit Policy

The permit policy is a different creature, and presents a closer question. Before considering the merits of the towing permit policy, however, we must address whether the Towing Companies have standing to raise this claim.

To show Article III standing, a plaintiff has the burden of proving: (1) he or she suffered an "injury-in-fact," (2) a causal relationship between the injury and the challenged conduct, and (3) the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).* "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.'" *Facio v. Jones, 929 F.2d 541, 545 (10th Cir. 1991)* (quoting *O'Shea v. Littleton, 414 U.S. 488, 495-96, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974)).*

The Commissioners assert the Towing Companies lack standing to challenge the permit policy because the Towing Companies were not denied a regular size tow truck permit or the opportunity to perform a tow due to a lack of a permit. According to the Commissioners, the Morses in particular lack standing to challenge the denial of their large tow truck permit because they attempted to acquire a county permit on behalf of an out-of-county operator. Nevertheless, for purposes of this opinion, we will assume, without deciding, all appellants in this case have standing to assert this claim. *See generally Gaylor v. United States, 74 F.3d at 216.* We assume the Towing Companies have standing because the record shows the Towing Companies continue to be affected by the application of the permit policy and

have expressed an interest in operating a towing business or being placed on the sheriff's non-preference towing list.

On the merits, the district court held the towing policy does not, as a matter of law, amount to a law, a regulation, or have the force and effect of law. After reviewing the record, we agree with the district court that the Towing Companies have failed to show the permit policy is an "official, government-imposed policy" enacted pursuant to the county's home rule authority. *See United Airlines, 513 U.S. at 229 n.5; see also* K.S.A. § 19-101a.

To prove the permit policy has the force and effect of law, the Towing Companies cite to the December 1997 Board of County Commissioner's minutes. This evidence, however, is insufficient because the minutes do not show or even hint that the Commissioners passed a resolution and published in the official county newspaper pursuant to K.S.A. § 19-101a. n6 The minutes expressly state the county counselor "reported" a temporary moratorium on non-preference tow calls and a forthcoming permit policy. Indeed, at the time the county counselor announced the policy, the permit form had not yet been designed. Thus, for the same reasons the geographic policy does not constitute a law or regulation, we likewise hold as a matter of law the informal permit policy fails to amount to a law or regulation.

We are also not convinced the permit policy, as a matter of law, has the force and effect of law. The permit form clearly requires the applicant to provide personal and tow truck information, tender a copy of the inspection report, supply the location of the storage area, and complete and sign the permit form. After the applicant completes the form, the sheriff and county commission chairman must approve and sign the permit form before the applicant can receive non-preference calls from the sheriff's department.

It appears the permit form, however, is a mere formality that requires no more from the tow operators than was previously required by law. Under the permit form, the applicant must have current Kansas Corporate Commission licensing and a Department of Transportation inspection, but such requirements were already in effect before the permit form was promulgated. Moreover, the applicant must have a legal, properly zoned storage area, but Linn County had local zoning ordinances regulating the storage of impounded vehicles already in effect before the permit policy was announced. For these reasons, we conclude the permit policy is a *pro forma* application that merely consolidates the previous licensing, inspection, and storage information onto one form.

Even if the permit form is more than *pro forma*, the requirement that the sheriff and chairman approve and sign each application does not imbue the permit policy with the force and effect of law. Like the geographic division policy, it is evident the permit policy fails to articulate a "binding standard of conduct" for the sheriff or county commission chairman. *See United Airlines, 513 U.S. at 229 n.5.* Neither person suffers a repercussion if he fails to approve and sign the permit form, or violates the policy by under- or over-enforcement. Based on the absence of any evidence suggesting the permit policy imposed a binding standard of conduct on the sheriff or chairman, we hold the permit policy, as a matter of law, does not have the force and effect of law. Accordingly, the permit policy is not preempted by the ICCTA.

In summary, for the reasons stated, we **AFFIRM** the district court's grant of partial summary judgment for Commissioners; we **AFFIRM** the denial of the Towing Companies' partial summary judgment motion; we **AFFIRM** the denial of the Towing Companies' preliminary

injunction; and we **AFFIRM** the denial of the Towing Companies' motion for reconsideration.

Entered by the Court:

WADE BRORBY

United States Circuit Judge

DISSENTBY:

BRISCOE (In Part)

DISSENT:

BRISCOE, Circuit Judge, concurring and dissenting:

I concur in part and dissent in part. I agree with the majority that the geographic division policy implemented by Sheriff Stites does not amount to a law, regulation, or other provision having the force and effect of law, and therefore is not preempted by *49 U.S.C. § 14501(c)(1)*. I disagree, however, with the majority's similar assessment of the permit policy. In my view, the permit policy is preempted by § 14501*(c)(1)* because it has the force and effect of law and is "related to a price, route or service" of the plaintiffs. I would reverse and remand the case to the district court to determine whether, as asserted by defendants, the permit policy is saved by the safety exception set forth in § 14501*(c)(2)(A)*.

Section 14501(c)(1) prohibits states and political subdivisions thereof from "enacting or enforcing . . . laws, regulations, or other provisions having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

49 U.S.C. § 14501(c)(1). As the majority correctly observes, the threshold question in applying § 14501(c)(1) is whether the policy at issue constitutes a "law, regulation, or other provision having the force and effect of law." The policy at issue, i.e., the permit policy, was allegedly passed pursuant to a resolution of the Linn County Board of County Commissioners requiring any towing service operator contacted by sheriff's office dispatchers to have a "permit." App. at 411 (indicating that the permit policy was enacted pursuant to the consensus agreement of the Board pursuant to the home rule powers allotted under Kansas law). It is unclear from the record whether the Board complied precisely with the terms of the Kansas home rule powers statute by publishing notice of the resolution "in the official county newspaper." Kan. Stat. Ann. § 19-101a(b). Thus, I agree with the majority that the Towing Companies have failed to show the permit policy is an official law or regulation enacted pursuant to the county's home rule authority.

The question remains, however, whether the permit policy "has the force and effect of law." In deciding this question, the majority correctly notes that the phrase "having the force and effect of law," as used in § 14502(c)(1), "is most naturally read to 'refer to binding standards of conduct that operate irrespective of any private agreement.'" *American Airlines, Inc. v. Wolens, 513 U.S. 219, 229 n.5, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995)* (interpreting identical phrase used in the Airline Deregulation Act of 1978). Applying this definition, the majority concludes that the permit policy does not have the force and effect of law because (1) the permit application "is a mere formality that requires no more from the tow operators than was previously required by law," Slip op. at 22, and (2) even though the sheriff and county commission chairman must approve and sign each completed

application, "neither person suffers a repercussion if he fails to approve and sign [a particular] permit form, or violates the policy by under- or over-enforcement." *Id.* at 23.

I disagree with the majority's conclusions. Even though the majority characterizes the permit form as a "mere formality," the fact is that the permit policy imposes binding standards of conduct on towing service operators interested in receiving business from the county (i.e., non-preference calls from the sheriff's dispatchers). If towing service operators do not complete the permit form, they will lose the towing business generated by non-preference calls from the sheriff's dispatcher. Our focus in addressing § 14501(c)(1) should be upon the permit policy's effect upon the conduct of towing service operators, and not its effect upon the conduct of the sheriff and county commission chairman. By downplaying the effect of the permit policy upon towing service operators, the majority acts in contravention of the intended purpose of the Interstate Commerce Commission Termination Act (to preempt state regulation of intrastate motor carrier activities) and paves the way for other states or political subdivisions to impose their own unique procedural requirements on towing service operators or other motor carriers.

Because the permit policy, in my view, has the force and effect of law, it is expressly preempted by § 14501(c)(1) if it is "related to a price, route, or service" of the plaintiffs. There is no dispute that the permit policy does not expressly refer to, or have a significant economic effect upon, towing service rates. It is apparent, however, that the permit policy expressly refers to towing services. On its face, the policy applies solely to towing service operators and provides that such operators must have a county-authorized permit before they are eligible to be placed on

the county's referral list and receive calls for towing service from sheriff's office dispatchers. Although the permit policy does not, as pointed out by the majority, impose any new substantive standards upon towing service operators, this appears to be irrelevant for preemption purposes in light of *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992)* (construing in a broad fashion similar "related to" language in the Airline Deregulation Act of 1978 and holding that it results in preemption of any state or local law that has a "connection with or reference to" airline rates, routes, or services). Thus, the permit policy runs afoul of § 14501(c)(1).

Defendants assert that even if the permit policy is otherwise preempted by § 14501(c)(1), it is saved by § 14501(c)(2)(A), which provides that § 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *49 U.S.C. § 14501(c)(2)(A)*. This argument raises a factual issue which requires remand to the district court. There appears to be a genuine factual dispute concerning whether the permit policy was actually implemented by the Board for safety reasons. For example, contrary to the defendants' current assertions on appeal, defendant Read, one of the Linn County Commissioners, testified that the permit requirement was implemented solely due to concerns about the county's potential liability if it contacted and utilized a towing service that had not satisfied otherwise applicable state and federal requirements. App. at 414. Assuming, arguendo, the permit policy was adopted for safety reasons, there are also two significant legal questions that must be resolved. First, there is the question of whether § 14501(c)(2)(A)'s safety exception applies to regulations implemented by political subdivisions of a state (as opposed to regulations implemented by the state itself). There is currently a split of opinion concerning whether §

14501(c)(2) applies to laws and regulations implemented by political subdivisions of a state. Some courts have concluded that the exception applies only where the safety regulation at issue was implemented by the state itself. See *R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 545-46 (11th Cir. 1998)* ("We view Congress' omission of a reference to a state's political subdivisions from § 14501(c)(2)(A) as a manifestation of Congress' intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1)."), cert. denied, *526 U.S. 1038, 143 L. Ed. 2d 498, 119 S. Ct. 1334 (1999); Petrey v. City of Toledo, 61 F. Supp. 2d 674, 680 (N.D. Ohio 1999)* ("The exception in § 14501(c)(2)(A) limits the authority of a state to delegate its regulatory authority over tow truck operators to local or municipal governments."). Other courts have concluded that the exception applies to safety regulations enacted by political subdivisions if the state has delegated its safety regulatory authority to those subdivisions. See *Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 775-76* (2d Cir.) (" *49 U.S.C.* § *14501*(c)(2)(A) does not limit the authority of a state to delegate its towing regulatory authority to local or municipal governments."), cert. denied, *528 U.S. 868, 145 L. Ed. 2d 140, 120 S. Ct. 166 (1999); Harris County Wrecker Owners v. City of Houston, 943 F. Supp. 711, 727 (S.D. Tex. 1996)* ("The court concludes that 49 U.S.C. § 14501(c)(2)(A) permits municipalities to enact safety regulations related to a price, route, or service of a tow truck if a State has redelegated its regulatory authority to its political subdivisions."). Finally, assuming, arguendo, that § 14501(c)(2) is applicable to safety regulations adopted by political subdivisions of a state, there is the question of whether the State of Kansas has delegated its towing regulatory authority to counties and other political subdivisions in the state.

While I agree with and concur in the majority's affirmance of the district court's rulings on the geographic division policy, I would reverse the district court's grant of summary judgment in favor of defendants on plaintiffs' claim that the permit policy is preempted by § 14501(c)(1) and remand for further consideration of defendants' argument that the permit policy is saved by the safety exception set forth in § 14501(c)(2)(A). For the same reasons, I would reverse and remand the district court's denial of plaintiff's motion to preliminarily enjoin the permit policy.

Footnotes

** The Honorable Henry Politz, United States Circuit Judge for the Fifth Circuit, sitting by designation.

* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 Mr. Martin, Mr. Haynes and the Morses brought suit in the district court alleging Sheriff Stites and the Commissioners violated anti-trust, civil rights, and federal preemption laws. The summary judgment order appealed here deals only with the preemption claim. Mr. Schoenhals, a private tow operator and owner of Northside Auto, is also a defendant in the case, but is not involved in the federal preemption issue in this appeal.

n2 A "non-preference tow" call is one in which the owner or operator of a disabled vehicle has no preference for a particular tow truck operator. In such an instance, the sheriff's department relays a call to a local tow truck company. If, however, the owner or operator of the disabled vehicle expresses a preference for a particular tow operator, the sheriff's dispatcher calls the requested tow truck operator.

n3 The district court did not explain whether the "towing policy" it referred to was the permit or the geographic division policy, or both.

n4 We assume the Towing Companies' counsel inadvertently violated Federal Rule of Appellate Procedure 28(a)(5) and Tenth Circuit Rule 28, by failing to include, in appellant's brief, a statement of the issues presented for review.

n5 In addition to the filed papers we will examine the oral testimony from the preliminary injunction hearing. "While the use of oral testimony on summary judgment motions is not improper, ... the determinations made in ruling on summary judgment materials and such testimony are not findings reviewable on the clearly erroneous standard of Rule 52(a), but are reviewed under Rule 56(c) to ascertain whether there is an absence of any genuine issue as to any material fact and whether the movant was entitled to judgment as a matter of law." *Riley v. Brown & Root, Inc., 896 F.2d 474, 477 n.5 (10th Cir. 1990).* Thus, contrary to the Sheriff Stites' assertion in his brief, we do not examine the trial court's ruling under the "clearly erroneous" standard, despite the fact the trial court conducted an evidentiary hearing. *Id. at 476.*

n6 The record does not suggest the Commissioners passed the permit policy pursuant to a resolution. Chairman Read testified the Commissioners enacted the policy pursuant to a "consensus agreement," but such an informal agreement made in an executive session fails to rise to a resolution, particularly in light of Chairman Read's admission the Commissioners are prohibited from taking any action in an executive session. The December 1997 minutes, from the public meeting, fail to mention the Commissioners passed a resolution or even voted on the permit policy.

CIVIL ACTION No. 98-2226-GTV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JIMMIE L. MARTIN d/b/a J&L SERVICES, EDDIE M. HAYNES d/b/a TWILITE RECOVERY SERVICE, MORSE'S AUTO SALVAGE AND TOW SERVICE, INC., LESLIE L. MORSE, SR., JOHN W. MORSE, AND ROBERT L. MORSE,
Plaintiffs,

vs.

MARVIN V. STITES, LINN COUNTY SHERIFF, MARTIN J. READ, HAROLD J. MOONEY, JR., and CHARLES TRASK, LINN COUNTY BOARD OF COUNTY COMMISSIONERS, and DEAN SCHOENHALS d/b/a NORTHSIDE AUTO,
Defendants.

ORDER

The case is before the court on the parties' cross-motions for summary judgment on Count VI of the Amended Complaint. On March 9, 1999, plaintiffs' filed a motion for preliminary injunction and partial summary judgment (Doc. 44) alleging that Linn county Sheriff Marvin V. Stites' towing policies were preempted by 49 U.S.C. S 14501. In their response to this motion, defendants also moved for summary judgment on the preemption issue (Doc. 56).

On April 13, 1999, the court conducted an evidentiary bearing on plaintiffs' motion for preliminary injunction. The court denied plaintiffst motion, ruling that,

because plaintiffs failed to put forth evidence that Sheriff Stites' towing policy amounted to a law, a regulation, or other provision having the force and effect of law, the policy was not preempted by § 14501.

The court has reviewed the parties' summary judgment papers and finds that there are no issues of material fact in dispute. The court concludes that, as a matter of law, Sheriff Stites' towing policy does not amount to a law, a regulation, or other provision having the force and effect of law. See K.S.A. 19-101a. Accordingly, the towing policy is not subject to preemption.

IT IS, THEREFORE, BY THE COEJRT ORDERED that defendants' motion for partial summary judgment (Doc. 56) is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction and partial summary judgment (Doc. 44) is denied.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 29 day of April 1999.

G. T. VanBebber
United States District Judge

CIVIL ACTION No. 98-2226-GTV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JIMMIE L. MARTIN d/b/a J&L SERVICES, EDDIE M. HAYNES d/b/a TWILITE RECOVERY SERVICE, MORSE'S AUTO SALVAGE AND TOW SERVICE, INC., LESLIE L. MORSE, SR., JOHN W. MORSE, AND ROBERT L. MORSE,
Plaintiffs,

vs.

MARVIN V. STITES, LINN COUNTY SHERIFF, MARTIN J. READ, HAROLD J. MOONEY, JR., and CHARLES TRASK, LINN COUNTY BOARD OF COUNTY COMMISSIONERS, and DEAN SCHOENHALS d/b/a NORTHSIDE AUTO,
Defendants.

ORDER

This case is before the court on plaintiffs' motion to reconsider (Doc. 86). The court construes plaintiffs' motion as one seeking to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons stated in this order, the motion is denied.

A motion to alter or amend pursuant to Rule 59(e) presents the court with the opportunity to rectify manifest errors of lay or tact and to review evidence newly discovered. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450—51 (1982); *Brown v. Presbyterian Healthcare Serve.*, 101 F.3d 1324, 1332 (10th Cir. 1996), cert. denied, 520 U.S. 3.181 (1997); Barrett v. Fields, 941

F. Supp. 980, 984—85 (0. Ran. 1996). It does not permit the losing litigant to rehash arguments previously addressed and rejected or to present new legal theories or facts that could have been raised earlier. The decision whether to grant or deny a Rule 59(e) motion to alter or amend the judgment is committed to the court's sound discretion. Brown, 101 F.3d at 1331.

Plaintiffs claim reconsideration is required to correct the court's clear error and to prevent manifest injustice. Specifically, plaintiffs argue that the court, in reaching its decision, "misapprehended the facts and the law." The court disagrees with plaintiffs and denies their motion.

From the record before it, the court is convinced that it appropriately considered the relevant facts and applied the relevant law. As stated at the preliminary injunction hearing, the Linn County towing policy does not amount to a law, regulation, or other provision having the force and effect of law; therefore, it is not preempted by 49 U.S.C. 5 14501. Although the county commission may have had input into the creation of the current tow policy, this fact alone does not imbue the tow policy with the force and effect of law. Put simply, the policy is not a law; it can be changed at any time. Furthermore, although the county commission has the power to pass legally binding legislation under various Kansas statutes, the court was presented with no evidence that the county commission passed a regulation, an ordinance, or any other legally binding legislation with respect to the Linn County towing policy. Accordingly, the policy is not preempted by § 14501. Plaintiffs' motion to reconsider is denied.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiffs' motion for reconsideration (Doe. 85) is denied.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 11 day of June 1999.

G. T. VanBebber
United States District
Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JIMMIE L. MARTIN, d/b/a J & L Services; EDDIE M. HAYNES, d/b/a Twilite Recovery Services; MORSE'S AUTO SALVAGE & TOW SERVICE, INC.; LESLIE L. MORSE, SR.; JOHN W. MORSE; ROBERT L. MORSE,
Plaintiffs-Appellants,

v.

MARVIN V. STITES, Linn County Sheriff, in his individual and official capacities; MARTIN J. READ; HAROLD J. MOONEY, JR.; CHARLES TRASK, Linn County Board of County Commissioners, in their individual and official capacities; DEAN SCHOENHALS, d/b/a/ Northside Auto,
Defendants-Appellees.

ORDER

Filed March 20, 2001

Before BROBRY, POLITZ* and BRISCOE, Circuit Judges

* The Honorable Henry Politz, United States Circuit Judge for the Fifth Circuit, sitting by designation

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled that petition is also denied.

Judge Briscoe would grant rehearing.

Entered for the Court

PATRICK FISHER, Clerk of Court

Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 00-1893

IN THE

Supreme Court of the United States

JIMMIE L. MARTIN, d/b/a J & L SERVICES, *et al.*,

Petitioners,

v.

MARVIN V. STITES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are a county sheriff's decisions as to which tow operators his dispatcher will call for which non-preference tows in his county preempted as a "regulation or other provision having the force and effect of law," that relate to "price, route or services"?

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STATEMENT OF THE CASE

Petitioners are tow truck operators in Linn County, Kansas, who sued Linn County Sheriff Marvin V. Stites and three members of the Linn County Board of Commissioners because they did not like Sheriff Stites' decisions determining which tow operators his dispatcher would call to tow vehicles whose owners were incapable of expressing a preference, or had no preference, for a particular tow operator ("non-preference tows"). Petitioners sought preliminary injunctive relief and partial summary judgment on their claim that Sheriff Stites' policies were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), specifically by 49 U.S.C. § 14501(c).

The district court, the Honorable G.T. VanBebber, held an evidentiary hearing on the motion for preliminary injunction to allow petitioners to present evidence. The district court ruled in favor of respondents, holding that petitioners failed to put forth evidence that Sheriff Stites' policies amounted to regulation or other provision with the force of law that would be preempted by § 14501(c)(1). The district court subsequently granted partial summary judgment to respondents based upon the conclusion reached at the end of the evidentiary hearing. After the district court denied petitioners' motion to reconsider, that order was certified as a final order and appealed to the Tenth Circuit, which affirmed and then denied rehearing. Neither the district court nor the Tenth Circuit reached the issue of whether the policies were exempted from preemption by § 14501(c)(2)(A) as safety regulations, and petitioners have not presented that issue for review. Also not reached below was respondents' standing argument.

When Sheriff Stites first took office in January, 1995, his department relayed non-preference tows using a geographical division of the county, giving preference to the closest unit. Approximately 80% of tow referrals arise in the eastern side of the county, where petitioners Martin and Hanes but not the Morse petitioners were located.[1] The Morse petitioners complained repeatedly to Sheriff Stites about this system and related matters, such as other companies storing towed vehicles in improperly zoned areas. Sheriff Stites asked all tow truck operators then in operation in the county to meet and agree upon some system for the dispatcher to make non-preference tow calls. The operators were not able to agree, so Sheriff Stites adopted a proposal put forward by petitioner John Morse involving a geographical division of the county. However, the Morses continued to complain about the geographical division and other matters.

Therefore, in December, 1997, Sheriff Stites implemented a pure rotational system for non-preference tow referrals. Under this rotational policy, the dispatchers called tow operators on a rotational basis regardless of geographic location. Sheriff Stites testified that he implemented this rotational policy, that it was his policy, that he did not recall even discussing that policy with the county commissioners prior to adopting it, and that he took full responsibility for it.

Also, in December, 1997, the commissioners held a meeting that included an executive session. The commissioners

---

1. Linn County is on the Kansas-Missouri border approximately 60 miles south of the metropolitan Kansas City area. The principal highway running through the county, 69 Highway, is on the eastern side, close to the Missouri border.

discussed county-initiated tows and the county's potential liability at that meeting. After the executive session — during which, as Commissioner Read acknowledged, Kansas law prohibits commissioners from taking any action — the county counselor "reported" that the county would engage in a sixty (60) day moratorium for towing county requested vehicles and would then use only tow operators who filled out a not-yet-designed application. The county counselor, Sheriff Stites and the county clerk were to design the application, which thus did not exist on the date petitioners claim it was adopted.

The county subsequently did design a form entitled "application for permit for towing services for Linn County." The form sought information about the tow trucks or vehicles in use, asked whether the operator had current Kansas Corporation Commission ("KCC") authority, requested a copy of the vehicle inspection report complying with 49 C.F.R. 396.17-396.23, and asked whether the operator had a legal, properly zoned area for storage of vehicles. Petitioners have never disputed that they needed KCC authority, had to comply with 49 C.F.R. 396.17-396.23 or had to store towed vehicles in a legal, properly zoned area; their dispute is in having to show that they complied before receiving non-preference calls through the dispatcher.

Although the form was designated an application for a permit, what was at issue was whether or not the tow truck operator would be placed upon the dispatcher's list for non-preference and county tow calls. The form had nothing to do with whether a tow operator could tow vehicles in Linn County. Furthermore, an out-of-county tow service did not

need a permit for any reason.[2] Thus, tow operators who did not fill out a form could continue to tow in the county without any penalty but would not receive calls from the Sheriff's department unless the consumer requested their service.[3] Petitioners all filled out forms and all were placed on the dispatcher's call list until petitioner Martin asked Sheriff Stites to remove his vehicles.

Sheriff Stites abandoned the pure rotation policy that he had implemented in December, 1997 after approximately two months. He did not believe that the pure rotation system worked properly and identified two instances in which problems had occurred. In both cases, a sheriff's deputy was delayed at the scene, waiting for a tow unit from the far side of the county. In one instance, the delay resulted in a citizen complaint about the department's slow response time because

2. The Morse petitioners also sought to affiliate with an out-of-county company that had a large wrecker, i.e., one that could tow eighteen-wheelers. An out-of-county operator did not need to fill out the permit form. Petitioners claim that only defendant Schoenhals (a towing operator not involved in this appeal) was allowed to provide large wrecker services. This argument is false. First, defendant Schoenhals had sold his large wrecker for lack of business prior to the hearing. Second, Sheriff Stites testified that he could not recall a single non-preference tow call for a large wrecker because most truckers had service contracts with tow companies.

3. Sheriff Stites did, at one point, instruct his dispatcher not to call petitioner Haynes because Haynes had only a "repo" truck that could only be used if the vehicle to be towed was on the road and had all four tires inflated. Petitioners never linked this refusal to call a single operator with equipment known to be inadequate to the commissioners or any county action or policy in any fashion. Haynes had previously been on the list but was taken off it when petitioner Martin, who owned the trucks he and Haynes were using, asked Sheriff Stites to remove his trucks.

the deputy waiting for the Morse tow truck was one of only two on duty at the time. Sheriff Stites was concerned about possible delays and that they might effect public safety, although he never undertook any scientific study of the matter. He changed back to the geographic division policy because he felt it was safer, that it would improve response times, and to some degree it was based on economics by calling the closest wrecker since towing companies frequently charged a per mile fee. Both Sheriff Stites and Commissioner Reid testified that the geographic division policy was the Sheriff's.

Petitioners have acknowledged that Sheriff Stites needs some system under which his dispatcher can call a particular tow operator to perform non-preference or county tows. Petitioners want a pure rotation policy rather than the geographic division that Sheriff Stites decided to use, but they have never explained how their desired policy would not be preempted if Sheriff Stites' geographic division system is.

REASONS FOR DENYING THE WRIT

The petition should not be granted, because petitioners never made even the minimal threshold showing below that the Sheriff's challenged policies constitute a regulation or other provision having the force in effect of law so that the statutory preemption would apply. Petitioners concede that the Sheriff's policies are not regulations by not setting them out as required by Supreme Court Rule 14.1(f). Petitioners conceded below that Sheriff Stites is entitled to establish a policy or system — although they would prefer a different policy — for determining which towing company will receive which calls from the Sheriff's dispatcher.

This case is not about private towing contracts between any towing company and any motor vehicle owner, or about towing calls where the owner of the vehicle to be towed expresses a preference for a particular towing company. The challenged policies relate only to which towing company will receive which calls from the Sheriff's office to perform towing work when the owner of the vehicle to be towed is not present, is incapacitated, or has no preference.[4] The policies have nothing to do with whether petitioners or any other towing company, whether based in Linn County or not, can perform tows in Linn County.

I. SHERIFF STITES' POLICIES REGARDING WHICH TOWING COMPANIES WILL BE CALLED FOR WHICH TOWS BY HIS DISPATCHER DO NOT RISE TO THE LEVEL OF A REGULATION OR OTHER PROVISION WITH THE FORCE AND EFFECT OF LAW

The ground upon which the district court made its determination, and the issue specifically addressed by the Tenth Circuit Court of Appeals, relate to whether Sheriff Stites' policies are provisions that had the force and effect of law. Both courts correctly found that they were not. Petitioners have conceded that the policies are not regulations in their petition.

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4. Non-preference tows can be either consensual, if the vehicle's owner is present and coherent but simply has no preference for a particular tow operator, or non-consensual. Examples of non-consensual tows include accidents resulting in the death or serious injury of the vehicle's owner, abandoned vehicles or stolen vehicles recovered by the Sheriff's deputies. Section 14501(c)(2) specifically allows local regulation of rates for nonconsensual tows.

The question, therefore, is what constitutes a provision with the force and effect of law. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court construed similar preemption language from the Airline Deregulation Act that prohibits a state from enacting or enforcing any regulation "or other provision having the force and effect of law" relating to rates, routes or services of any air carrier. *See Wolens*, 513 U.S. at 222-23. The Court held that "the word series 'law, . . . regulation . . . or other provision' . . . 'connotes official, government-imposed policies' " while "the phrase 'having the force and effect of law' is most naturally read to refe[r] to binding standards of conduct.' " *Id.* at 229 n.5.

At issue in *Wolens* was whether plaintiffs could sue an airline under a state's consumer protection statute, specifically Illinois' Consumer Fraud Act. The Court described that act as "prescriptive" because "it controls the primary conduct of those falling within its governance." *Id.* at 227. The Court held that the statute served "as a means to guide and police the marketing practices of the airlines" so that plaintiffs' claims under the act were preempted. *See id.* at 228.

Petitioners failed to present any evidence to suggest that either the geographic division policy or what the Tenth Circuit designated the "permit policy" had the force and effect of law because they constituted a guideline or binding standard. Sheriff Stites could change that geographic division policy at any time, just as he did in December, 1997 and February, 1998. The permit form is a mere formality that requires no more from any tow operator than was previously required by unchallenged law. No tow operator is required to obtain a permit in order to do business in the county, unlike the license

requirement found preempted in *Petrey v. City of Toledo*, 246 F.3d 548, 552 (6th Cir. 2001) (employee cited for towing without a license) and *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043-44 (9th Cir.), *cert. denied*, 121 S. Ct. 1085 (2001) (tow operator and employees threatened with legal action for failing to comply with city ordinances). Here, nothing would happen to tow operators who towed vehicles on the other side of the county or without filling out a permit form. Furthermore, nothing would happen to Sheriff Stites or his dispatcher if a call was made to a tow operator on the wrong side of the county or that had not filled out a form.

Furthermore, § 14501(c) does not preempt a local political jurisdiction's ability to determine which tow operator it will hire or call. In *Petrey*, the Sixth Circuit held that the City of Toledo could set standards and choose towers best able to perform for nonconsensual, i.e., police tows. *See Petrey*, 246 F.3d at 555. In *Tocher*, the Ninth Circuit held that the Santa Ana Chief of Police could establish rules and regulations governing tow operators that would be placed on a rotational tow list and called by the police. *See Tocher*, 219 F.3d at 1049. Surely § 14501(c) does not require Sheriff Stites to call tow operators who do not have adequate and safe equipment for tows any more than it prohibited the City of Toledo and the City of Santa Ana from exercising their discretion in picking the tow companies that they would call for their towing needs.

This Court has also had occasion to address when a rule, standard or regulation has the force and effect of law outside the preemption context. *See Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Guidelines "have the force and effect of laws," where "a judge who

disregards them will be reversed" and where they are "significant, legally binding prescriptions governing application of governmental power against private individuals." *Id.* A decision to call tow operators on the east side of the county with vehicles that had passed a federally required inspection for tows on the east side of the county hardly amounts to "legally binding prescriptions."

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) the Court addressed directly whether a regulation would have the force and effect of law and how a regulation would not have that effect unless it had both certain substantive characteristics and was the product of certain procedural requisites. *See id.* at 301. Substantive rules differ from interpretive rules and are rules that effect individual rights and obligations. This characteristic, the Court held, "is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' " *Id.* at 302 (*quoting Morton v. Ruiz*, 415 U.S. 199 (1974)). Furthermore, not only must a regulation be substantive, but it also ***must have been promulgated in conformity with statutory procedural requirements***. *See id.* at 303. Here, the policies were not adopted in accordance with any of the required procedural elements under Kansas law. Instead, the Sheriff's policies are more analogous to interpretive rules that are "issued by an agency to advise the public of the agency's construction of the statues and rules which it administers" that do not have the force and effect of law. *See Chrysler*, 441 U.S. at 302 n.31.

Petitioners presented no evidence that Linn County attempted to comply with K.S.A. § 19-101a, which is the statute setting forth the procedure for a county exercising its home rule powers. That statute requires a county to pass a

resolution through its Board of County Commissioners and then to publish that resolution in the official county newspaper. *See* K.S.A. § 19-101a(b). Petitioners presented no evidence of any resolution being passed. Instead, the record showed that the County Commission "informed" petitioner John Morse that it hoped to have an answer to his question "concerning legal towing and storage in the county" within sixty days, and that in February, the County Commission "reported" that towing services would be split geographically for county tows and non-preference tows. Petitioners presented no evidence whatsoever of any vote, any resolution, or any report being published in the county newspaper.

Petitioners instead attempt to raise the spectre of uncontrolled regulation of tow operators by cities and counties, contrary to Congress' intent, because they claim governments will be able to pass ordinances without validly enacting them. That simply is not the case here. Sheriff Stites was not creating a prescriptive policy that controlled tow operators' conduct, or ticketing them for operating on the opposite side of the county or without having filled out a form. Nothing in § 14501(c) says that Sheriff Stites has to dispatch a tow truck that he knows cannot handle the job.[5] The fact that Sheriff Stites chose a geographic division of the county — instead of always calling the closest operator, or assigning days for each willing operator to take calls — is not a law subject to preemption. Furthermore, the fact that Sheriff Stites chose to have his dispatcher call operators that he knew were complying with valid laws is not itself a law

5. In fact, petitioners apparently agree that Sheriff Stites can call tow operators with appropriate equipment, since they sought to obtain access to a large wrecker by affiliating with another operator so that they could receive large truck calls, if any ever arose.

or regulation. Petitioners' argument to the contrary would lead to the ridiculous result that a sheriff could not only not stop a tow truck driver for driving drunk, or without headlights, or with obviously defective and dangerous equipment (because a decision to enforce such a valid law would be preempted), but would even have to call that operator for someone whose only error was in not knowing the name of a towing company nearby or being able to say it after an accident. Neither policy has the force and effect of law, and the writ should be denied.

II. EVEN IF THE POLICIES ARISE TO THE STATUS OF REGULATIONS WITH THE FORCE AND EFFECT OF LAW, SAFETY IS NOT A PRICE, ROUTE OR SERVICE AND IS UNAFFECTED

Furthermore, to the extent the policies relate to safety or financial fitness/insurance issues, they are not preempted even if they do rise to the level of a regulation or provision having the force in effect of law. Congress never intended for preemption of "price, route or service" regulation to extend to regulation concerning safety or financial fitness. According to the House Conference Report, Congress' intent and belief was "that state authority to regulate ***safety, financial fitness and insurance*** . . . of motor carriers is unchanged since state regulation in those areas ***is not a price, route or service and thus is unaffected***." H.R. Conf. Rep. No. 103-677 at 85, reprinted in 1994 USCCAN at 1757 (emphasis added).[6]

6. In fact, 49 U.S.C. § 14501(c)(2)(A) specifically exempts safety and financial fitness regulations from preemption. Neither the district court not the Tenth Circuit reached the issue of whether that exemption protected Sheriff Stites' policies because both courts found that the policies did not rise to the level of law that would trigger preemption at all.

Obviously, the Court addresses a preemption question by analyzing the statute's text and assuming that historic police powers of the states are not to be superceded unless that was the clear and manifest purpose of Congress. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). In other words, the "ultimate touchstone" of preemption analysis is congressional intent, and understanding the scope of preemption rests primarily upon an understanding of congressional purpose. *Id.* at 485. Thus, regardless of how broadly the Court interprets the "relating to" language in § 14501(c)(1), Congress' purpose not to preempt regulations concerning safety because they were not regulations of price, route or service requires a finding that Sheriff Stites' safety concerns survive preemption.

Sheriff Stites testified about those safety issues. He chose to go from a rotational distribution system back to a geographic division system in part because of his safety concerns, which arose out of two incidents in two months in which a deputy was tied up at the scene of an accident waiting for a cross-county tow operator to arrive. Furthermore, the fact that Sheriff Stites does not place a tow operator on his dispatcher's call list until he has received information establishing the tow operator has a valid KCC authority and has passed a mandatory federal inspection also reflects safety concerns.

The Court adopts the level of preemption best calculated to carry out congressional design. *See Wolens*, 513 U.S. at 234. There, the Court rejected interpretations of its prior decisions that would have resulted in either minimal preemption or total preemption and chose instead a "middle course . . . best calculated to carry out the congressional design." *Id.* Sheriff Stites should not be required to call tow

operators with inadequate equipment or facilities and slow response times, or with operators "prone to damaging the cars they transport" any more than the City of Toledo was. *See Petrey*, 246 F.3d at 558. Congress' desire to protect towing companies from having to "adher[e] to a multitude of different regulatory schemes in every locality where [they] conducted business" is in no way thwarted if Sheriff Stites has his dispatcher call tow trucks from the eastern part of the county for tows in the eastern part of the county and tow trucks from the western part of the county for tows in the western part of the county. *Tocher*, 219 F.3d at 1048. *See also People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870, 880 (Cal. Ct. App. 2001) ("Congress's deregulatory purpose was focused on disparate *economic* regulation") (emphasis in original.

Congressional intent — the ultimate touchstone of preemption analysis — to preempt conflicting economic regulatory schemes simply does not extend to a county sheriff's policies as to which tow operators will receive which non-preference tow calls through his department. The writ should be denied.

CONCLUSION

The Court should deny the writ because Sheriff Stites' policies concerning which tow operators his dispatcher calls for which non-preference tows in his county are neither provisions with the "force and effect of law" nor, as safety concerns, related to "price, route or services," and thus are not preempted under 49 U.S.C. § 14501(c), and both the district court and the Tenth Circuit reached the correct result below.

Respectfully submitted,

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